

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Acceleration of Broadband Deployment)	WC Docket No. 11-59
Expanding the Reach and Reducing the Cost of)	
Broadband Deployment by Improving Policies)	
Regarding Public Rights of Way and Wireless)	
Facilities Siting)	

September 30, 2011

REPLY COMMENTS OF THE CITY OF HUNTSVILLE, ALABAMA

The City of Huntsville (“the City” or “Huntsville”) files these comments in reply to the Comments of Verizon and Verizon Wireless filed on July 18, 2011, in the above-referenced proceeding.

Since the passage of the Telecommunications Act of 1996 communities throughout the country have had to mount costly defenses of the protections afforded them by federal law. In the current forum communities are again being asked to defend both their authority to manage the public rights-of-way as well as their right to obtain fair a reasonable compensation for their use, or risk not only losing millions of dollars in legitimate revenue for the use of public land, but also the erosion of their police powers to protect the health, safety, and general welfare of their citizens.

In the current proceedings Verizon has complained to the Commission that:

“[L]ocalities in Alabama, including the major cities of Birmingham, Mobile, and *Huntsville*, require or are proposing to require providers to enter into franchise agreements and pay a percentage of gross revenue as a fee for using the public rights-of-way. Such requirements would ostensibly only apply to competing providers – not to the incumbent that has a statewide franchise. In 2008, Verizon approached Birmingham and Mobile with plans to build a physical network in those cities. But because of the

differential treatment, Verizon decided not to deploy a physical network in these Alabama localities (though it does serve customers in Birmingham and Mobile by leasing services from other carriers.)” (*emphasis added*)¹

Verizon does not allege discrimination on Huntsville’s part or even differential treatment.

Verizon also does not assert that it has been prohibited or effectively prohibited from providing service in the City. In fact, Verizon, through its subsidiary MCImetro Access Transmission Services LLC, owns and operates a metropolitan area fiber network in the City and has done so through predecessors-in-interest after receiving a franchise from the City to do so in 1994.²

In an announcement in 1995 touting the new fiber network Intermedia Communications of Florida, Inc., the then-current holder of the franchise, explained:

“The new metropolitan area network (MAN) will enable Huntsville businesses to transport voice, data and video signals utilizing a versatile and cost-effective alternative in connecting with their long distance carriers or other business locations Intermedia plans an initial 30-mile network designed to connect business customers to their long distance carriers. The network will serve the west and east Cummings Research Park area with an extension south to Memorial Parkway and west to serve additional customers in the area. The network will further extend to the Redstone Arsenal, the Marshall Space Flight Center, and into the Jetplex serving additional commercial business centers located near the airport”³

¹ Comments of Verizon and Verizon Wireless dated July 18, 2011 at p. 25, *In the Matter of Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, WC Docket No. 11-59. [hereinafter referred to as “Verizon’s Comments”].

² In 1994, Fibernet Huntsville, Inc., a wholly-owned subsidiary of Fibernet USA, Inc., (“Fibernet”) entered into a fiber optic network franchise with the City, City Ordinance No. 94-325, as amended from time to time. Shortly thereafter, in 1995, the City consented to the transfer of the franchise to Intermedia Communications of Florida, Inc., a subsidiary of Intermedia Communications, Inc. (“ICI”). Thereafter, in 2001, the City was notified that Intermedia Communications, Inc. would become a wholly owned subsidiary of WorldCom, Inc. Soon thereafter WorldCom, Inc., declared bankruptcy and emerged from bankruptcy as MCI Inc., which later merged with Verizon Communications. See Verizon Corporate History available at: <http://www22.verizon.com/investor/corporatehistory.htm>

³ *Intermedia Communications Begins Construction of Huntsville Fiber Optic Telecommunications Network*, Business Wire, July 13, 1995, available at: <http://www.thefreelibrary.com/INTERMEDIA+COMMUNICATIONS+BEGINS+CONSTRUCTION+OF+HUNTSVILLE+FIBER...-a017247452>

In response to the announcement Huntsville's then-current Mayor stated: "The presence of Intermedia Communications in our community signals our continued forward-looking commitment to the growth of our communications infrastructure" ⁴

Huntsville has been and continues to be "forward-looking" thanks in large part to its highly educated, motivated, and skilled work force; the continued presence and commitment of the space and defense industry to the area; the development of new industry including in the biotech, biomedical, and pharmaceutical fields; research parks that are an incubator for science and technology; and the educational institutions in the community including a number of public and private colleges and universities;⁵ all of whom benefit from, and in some cases even demand,⁶ the provisioning of advanced communications capabilities. In part because of this synergy of talent and technology Huntsville is consistently named as one of the best places to live and work by a variety of national publications.⁷

Huntsville is not only forward looking it is also mindful of its past. In fact the National Trust for Historic Preservation named Huntsville to its "2010 List of America's Dozen Distinctive Destinations".⁸ Richard Moe, president of the National Trust for Historic

⁴ *Id.*

⁵ For an overview of Huntsville see the Chamber of Commerce of Huntsville/Madison County website at: <http://www.huntsvillealabamausea.com/index.html>

⁶ In a brochure about Huntsville's Cummings Research Park ("CRP"), "one of the world's leading science and technology parks", it is noted: "CRP companies demand access to a dependable, state-of-the art telecommunications network. Huntsville was the first metro area in the USA to establish 100% digital switching and transmission facilities, and CRP companies are still among the first in the nation to access new telecom technologies." Available at: http://www.huntsvillealabamausea.com/new_exp/crp/news/CRP_Brochure.pdf

⁷ See the Chamber of Commerce of Huntsville/Madison County website at: http://www.huntsvillealabamausea.com/news/nat_recog.html

⁸ National Trust for Historic Preservation posted February 3, 2010, available at: <http://www.preservationnation.org/about-us/press-center/press-releases/2010/DDD-2010-Huntsville.html>

Preservation said about Huntsville: “Huntsville has beautifully preserved and protected so many of the diverse stories of its past, from its southern culture and heritage to its role as ‘America’s Space Capital’, and its citizens are not stopping there. . . . This designation recognizes not only their commitment to the past, but also their dedication to a sustainable future”.⁹

Part and parcel of Huntsville’s past and its future is communications. One reason that Huntsville was spared destruction during the Civil War was due in part to the fact that it was used as a communications center for Union forces.¹⁰ Southern Bell Telephone Company started serving the City in 1883,¹¹ the same year that Frank James, brother of Jesse James, was brought to trial in Huntsville for robbing a federal payroll.¹² With the bombing of Pearl Harbor in 1941 all but essential telephone construction was halted by South Central Bell, except in Huntsville, an important defense center, where materials were allocated “to increase the number of telephones served through the local system”.¹³ In recent years Verizon Wireless has contributed significantly to the communications landscape in the City by building a new, \$44 million dollar,

⁹ *Id.*

¹⁰ ELISE HOPKINS STEPHENS, *HISTORIC HUNTSVILLE A CITY OF NEW BEGINNINGS*, at p. 50 (Windsor Publications 1984).

¹¹ *GROW! HUNTSVILLE GROW YOUR TELEPHONE SYSTEM IS GROWING WITH YOU (COMMEMORATIVE ALBUM CELEBRATING OUR CITY’S SESQUICENTENNIAL OF PROGRESS)* at p. 263, (James Record and Tom McDonald editors 1955).

¹² DAVE AND SHARON DOOLING, *HUNTSVILLE A PICTORIAL HISTORY*, at p. 28 (The Donning Company/Publishers 1980).

¹³ *GROW! HUNTSVILLE GROW YOUR TELEPHONE SYSTEM IS GROWING WITH YOU (COMMEMORATIVE ALBUM CELEBRATING OUR CITY’S SESQUICENTENNIAL OF PROGRESS)* at p. 263, (James Record and Tom McDonald editors 1955).

state-of-the-art call center and state headquarters projected to bring up to 1300 jobs to the community.¹⁴

While the City looks to the future, the past is on Verizon's mind. The "statewide franchise" to which Verizon refers¹⁵ is not something new or even recent, but is state legislation adopted starting in the late 1800s that essentially grants the use of portions of the public highways in the state to telephone and telegraph companies.¹⁶ In the early 1900s the statewide grant was tempered by subsequent state law that has given local towns and cities certain authority over the use of the public rights-of-way.¹⁷ Towns and cities in the state also have regulatory control over their streets and the right to sell or lease franchises they have the power to grant.¹⁸

¹⁴ *Verizon Wireless Celebrates Job Growth as State-of-the-Art Call Center and State Headquarters in Huntsville, Alabama*, PRNewswire, October 26 available at: <http://www.prnewswire.com/news-releases/verizon-wireless-celebrates-job-growth-at-state-of-the-art-call-center-and-state-headquarters-in-huntsville-alabama-58933462.html>

¹⁵ Verizon's Comments at p. 25.

¹⁶ See, ALA. CODE § 2490 (1897) which provides: "The right of way is granted to any person or corporation having the right to construct telegraph or telephone lines within this state to construct them along the margin of any public highway." The current version of the statute found at ALA. CODE § 23-1-85 (1975), which is virtually identical to the early legislation, provides as follows: "The right-of-way is granted to any person or corporation having the right to construct electric transmission, telegraph, or telephone lines within this state to construct them along the margin of the right-of-way of public highways, subject to the removal or change by the county commission of the county, except in cases where the State Department of Transportation has jurisdiction over such highway."

¹⁷ See ALA. CONST. art. XII, § 220 (codified at ALA. CODE § 11-49-1 (1975)) which provides: "No person, firm, association, or corporation shall be authorized or permitted to use the streets, avenues, alleys, or public places of any city, town, or village for the construction or operation of any public utility or private enterprise, without first obtaining the consent of the proper authorities of such city, town, or village."

¹⁸ See ALA. CODE § 11-43-62 (1975) which provides: "The council shall regulate the use of the streets for the erection of telegraph, telephone, electric, and all other systems of wires and conduits and may require the same to be placed underground if deemed necessary for the public convenience and safety and generally to control and regulate the use of the streets for any and all purposes. The council may sell or lease in such manner as it may deem advisable any franchise which it has power to grant, and the moneys received therefor shall be paid into the city treasury."

Telephone companies that accepted the early statewide grant defend what they claim is a vested contractual property right;¹⁹ much like Verizon has done in New York where it claimed to enjoy an ancient local franchise as a successor-in-interest to New York Telephone.²⁰

Telephone companies that have not come within the ambit of the statewide grant and that want to install facilities in City streets are not prohibited, actually or effectively, from doing so, as evidenced not only by Verizon's entry into the Huntsville market, but also by the entry of others including the 1995 entry of another municipal fiber network provider that also built a network in Huntsville of approximately 30 miles and whose successor-in-interest has recently upgraded and/or expanded its network in the City.

Given the fact that Verizon has not alleged prohibition on the City's part, the FCC's consideration of its argument against the City need go no further. Until a local regulation acts as a barrier to entry, there is no barrier to remove under § 253. There is in fact no barrier to Verizon's entry into Huntsville and Verizon has not even attempted to provide proof that such a barrier exists. Even if one were to accept that this proceeding is the proper vehicle for seeking to preempt Huntsville's requirements, Verizon has failed to meet its burden of showing the need for Commission action. In seeking to preempt Huntsville's (and other local government) franchise requirement, Verizon must provide proof of being prohibited from entering the market.

¹⁹ See *Southern Bell Tel. & Tel. Co. v. City of Mobile*, 162 F. 523, 532 (S. D. Ala. 1907)(finding: "A right of way upon a public street, whether granted by act of the Legislature or ordinance of a city council, is an easement, and as such is a property right and entitled to all the constitutional protection afforded other property and contracts."); see also *BellSouth Telecommunications, Inc. v. City of Mobile*, 171 F. Supp. 2d 1261, 1263 & 1273 (S.D. Ala. 2001)(discussing statewide franchise and BellSouth's claim that city ordinance impaired its existing statewide franchise).

²⁰ See *City of Rome, New York v. Verizon Communications Inc.*, 362 F.3d 168, 172 (2d Cir. 2004)(As successor-in-interest to New York Telephone, Verizon maintained its position that an original franchise granted by the city to New York Telephone "had become 'a vested, indefeasible property right'").

The federal courts have consistently held that a provider supply actual evidence to support allegations of effective prohibitions.²¹ Similarly, this Commission's guidance with respect to petitions for preemption under § 253(a), notes specifically that "factual assertions should be supported by credible evidence, including affidavits, and, where appropriate, studies or other descriptions of the economic effects of the legal requirement that is the subject of the petition."²² The Commission has refused to find a violation of § 253(a) absent credible and probative evidence of actual harm.²³

In this instance Verizon has simply drawn the Commission's attention to the existence of what the company itself has claimed to enjoy in another state, that is, a vested right to occupy the rights-of-way.²⁴ Where a company seeks to have an otherwise valid state or local law preempted without so much as a claim much less a showing of prohibition, the company has not advanced the dialogue of successful broadband deployment. In fact, quite to the contrary -- by attributing its failure to deploy on what Verizon sees as cashed strapped local governments,²⁵ Verizon fails to comprehend the essential role towns and cities throughout this country can and do play in broadband deployment.

²¹ See, *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008); *Level 3 Commc'ns, L.L.C. v. City of St. Louis*, 477 F.3d 528, 532-33 (8th Cir. 2007); *New Jersey Payphone Association, Inc. v. Town of West, New York*, 299 F.3d 235, 240 (3d Cir. 2002); *Bellsouth Telecom. Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1187 (11th Cir.2001).

²² Suggested Guidelines for Petitions for Ruling under § 253 of the Communications Act, 13 F.C.C.R. 22970; 22971-72 (1998).

²³ See, *In the Matter of Cal. Payphone Assn*, 12 F.C.C.R. 14191; 14203-05 (1997); *In the Matter of TCI Cablevision of Oakland County, Inc.*, 12 F.C.C.R. 21396; 21,440 (1997); *In the Matter of American Communications Services, Inc. and MCI Telecommunications Corp.*, 14 F.C.C.R. 21579; 21299 (1999).

²⁴ See discussion *supra* at notes 19 and 20.

²⁵ See Verizon's Comments at pp. 17, 24 & 25.

As the Commission acknowledges in its present inquiry: “Public rights-of-way are especially critical to the deployment of communications facilities due to their widespread availability and efficiency for use in deploying communications networks.”²⁶ While telecommunications providers can and do acquire and maintain private easements, they cannot do so as effectively as local governments.²⁷ And, because local governments throughout the country have not shirked their responsibility of acquiring, maintaining, and managing rights-of-way this asset has been available for over 100 years for various users including communications and cable service providers to share and occupy in a reasonably orderly, predictable, and efficient manner. The cost and effort are significant and can even be prohibitive to local governments, especially if traditional sources of funding are reduced or eliminated.

Our resources, whether the airwaves or roadways, are finite. Therefore, they must be managed and apportioned in order to promote their efficient use and preserve their availability, thereby protecting and advancing broadband deployment. Moreover, where an asset is uniquely local, such as the public rights-of-way, they should be managed and regulated locally -- a costly proposition and one that deserves the Commission’s continued support.

Respectfully submitted,

/s/ K. Claudia Anderson

K. Claudia Anderson
Assistant City Attorney
Office of City Attorney
City of Huntsville, Alabama
308 Fountain Circle
Huntsville, AL 35801
(256) 427-5026

September 30, 2011

²⁶ *In the Matter of Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, WC Docket No. 11-59, at p. 3, note 9.

²⁷ *See id.* (commenting on the lack of viable alternatives)